United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 15-0702**
	)	**Issued: August 27, 2015**
DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND STATIONS, Keyport WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2015 appellant filed a timely appeal from a January 27, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On June 18, 2014 appellant, then a 61-year-old engineering technician, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of exposure to noise at

[1] 5 U.S.C. § 8101 *et seq.*

his work. He became aware of his condition and of its relationship to his employment on September 1, 2009. A supervisor noted that appellant had retired on April 2, 2010 and that his condition was first reported on June 16, 2014.

Appellant submitted an employment history dated June 6, 2014. He noted that, from 1972 through 1976, he was employed by the U.S. Navy, and was exposed to noise from engines for eight hours a day without hearing protection. From December 1976 through April 2010, appellant was employed by the employing establishment, where he was exposed to noise from ventilation fans and pounding for eight hours a day, and that he used hearing protection provided by the employing establishment during this period. He noted that he was last exposed to hazardous noise in April 2010.

Appellant also submitted an audiometric evaluation dated June 5, 2014.

By letter dated June 23, 2014, OWCP advised appellant of the evidence needed to establish his claim.

Appellant submitted hearing conservation data between December 7, 1976 and September 2, 2009.

By letter dated July 8, 2014, appellant explained that he had annual hearing tests while working for the employing establishment. He wrote, "My Supervisor was advised that I needed to go back to take another test after changes in my hearing were reported."

On July 29, 2014 OWCP referred appellant to an otolaryngologist to obtain a second opinion evaluation of the cause and nature of his hearing loss.

In a report dated August 27, 2014, Dr. Julie A. Gustafson, a Board-certified otolaryngologist, examined appellant, reviewed his medical records, and analyzed the results of an audiogram performed on that date. She found mild high-frequency sensorineural hearing loss of the left ear and mild-to-severe sensorineural hearing loss of the right ear. Dr. Gustafson noted, "The right ear hearing loss is not consistent with a noise-induced loss, particularly not from the reports of intensity and duration of the exposure reported in the workplace. This is particularly evident, since the left ear does not show the same associate loss." Dr. Gustafson stated that appellant's hearing loss was not due to noise exposure in federal civilian employment. She also stated, "For the minimal decrease in hearing in the left ear, noted on audiometric evaluation today, the workplace exposure is of sufficient intensity and duration to have caused the acoustic notch at 4,000 [hertz (Hz)] in the left ear."

By letter dated September 5, 2014, OWCP requested clarification from Dr. Gustafson regarding whether appellant sustained any hearing loss as a result of his exposure to noise during federal employment. In particular, it asked her to explain the relevance of her findings as to appellant's left ear.

On September 22, 2014 Dr. Gustafson stated that the inconsistency in her opinions expressed was due to the lack of audiometric data available for the time at which appellant ceased employment. She noted that an audiometric evaluation from 2011 had been mentioned in the case record, but that the audiometric evaluation was not available. Dr. Gustafson wrote, "If

the decrease in hearing as seen on the audiometric evaluation of February 2014 was present at the time of [appellant's] retirement, then the opinion would be that he had experienced work-related hearing loss. If the audiometric evaluation around the time of [appellant's] retirement does not show a greater than 25 decibel loss out of 4,000 [Hz,] then he did not experience a work-related hearing loss.... The supplied audiometric data stops eight years prior to [his] retirement. At the time of his last supplied audiogram, appellant did not have a hearing loss in the left ear. At the time of our evaluation four years following his retirement, he does have a hearing loss in the left ear."

On October 3, 2014 OWCP forwarded Dr. Gustafson's report and her letter of clarification to a district medical adviser (DMA) for review. The DMA responded that the audiometry from 2011 should be requested and obtained, if possible, as it was quite close to the date of appellant's retirement. He wrote, "It is not possible to [speculate] on the work[-]related hearing loss based solely on the 2014 audiogram without an attempt to obtain the 2011 audiogram much closer to the date of federal retirement."

By letter dated December 2, 2014, OWCP requested that appellant submit the hearing examination from 2011 to the case record.

Appellant responded by letter dated December 8, 2014, noting that the examination actually took place in 2012. He submitted a copy of the audiometry results, dated January 11, 2012.

OWCP forwarded the January 11, 2012 audiometry results to a DMA for review. The DMA indicated that they should be sent to Dr. Gustafson for analysis as to whether there was any ratable hearing loss in either ear.

In a supplemental report dated January 13, 2015, Dr. Gustafson examined the audiometry results January 11, 2012. She stated, "The audiogram of 2012 shows no evidence of hearing loss with the lowest level of hearing being at 20 decibels, which is above the threshold for loss of 25 decibels.... In conclusion, on a more probable than not basis, it is my opinion that [appellant] has not suffered a hearing loss due to industrial noise exposure, particularly none due to his work as a [c]ivilian [f]ederal [e]mployee."

By decision dated January 27, 2015, OWCP denied appellant's claim for compensation. It found that the medical evidence failed to establish a work-related injury. OWCP accepted that appellant was a federal civilian employee who filed a timely claim; that the employment factors occurred; that a medical condition had been diagnosed; and that he was within the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

employment injury.[2] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The claimant has the burden of establishing by the weight of reliable, probative, and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[4] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[6] Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition, and the specific employment factors identified by the claimant.[7] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[8]

[2] *Gary J. Watling*, 52 ECAB 278, 279 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Michael E. Smith*, 50 ECAB 313, 315 (1999).

[4] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 428 n.37 (2006); *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[5] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[6] *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117, 123 (2005).

[7] *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

[8] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

ANALYSIS

OWCP accepted that appellant was a federal civilian employee who filed a timely claim; that the employment factors occurred; that a medical condition had been diagnosed; and that he was within the performance of duty. It denied his claim finding that the medical evidence did not establish a causal relationship between factors of his federal employment and his hearing loss. The Board finds that appellant has not met his burden of proof to establish that his condition was causally related to duties of his federal employment.

The Board notes that in its initial development letter, OWCP stated that appellant's claim for compensation was untimely filed. However, appellant submitted hearing conservation data gathered during his time at the employing establishment. In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability may not be allowed if a claim is not filed within that time unless: (1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or (2) written notice of injury or death as specified in section 8119 was given within 30 days.[9]

The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for hazardous noise exposure is sufficient to constructively establish actual knowledge of a hearing loss, such as to put the immediate supervisor on notice of an on-the-job injury.[10] As appellant was enrolled in a hearing conservation program with the employing establishment, and submitted records of annual audiograms, the employing establishment had actual knowledge of his purported hearing loss. As such, OWCP properly found appellant's claim timely filed in its January 27, 2015 decision.

Regarding the issue of causal relationship, in a report dated January 13, 2015, Dr. Gustafson examined a January 11, 2012 audiogram and found it showed no evidence of hearing loss with the lowest level of hearing being at 20 decibels, which is above the threshold for loss of 25 decibels. He noted, "In conclusion, on a more probable than not basis, it is my opinion that [appellant] has not suffered a hearing loss due to industrial noise exposure, particularly none due to his work as a [c]ivilian [f]ederal [e]mployee."

The Board has recognized that a claimant may be entitled to a schedule award for hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[11] There is no medical evidence before OWCP at the time of its January 27, 2015 decision containing an opinion that appellant's hearing loss was work related. The only medical evidence containing a definitive opinion as to the relation of his hearing loss

[9] 5 U.S.C. § 8122(a).

[10] *G.C.*, Docket No. 12-1783 (issued January 29, 2013).

[11] *See J.R.*, 59 ECAB 710, 713 (2008).

and factors of his federal employment, the January 13, 2015 report of Dr. Gustafson, stated that his hearing loss was not related to industrial noise exposure. The Board finds that appellant has not submitted any medical evidence supportive of a causal relationship between his federal employment and his hearing loss, and thus has not met his burden to establish such a causal relationship.[12]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his hearing loss was causally related to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[12] *See R.S.*, Docket No. 14-1995 (issued February 25, 2015).